

IN THE MATTER OF	:	BEFORE THE
The Pack Shack, Inc.	:	BOARD OF APPEALS
Appellant	:	HEARING EXAMINER
vs.		
Howard County Department of	:	
Planning and Zoning	:	
Respondent	:	BA Case No. 570-D

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DECISION AND ORDER

On October 16, 2006, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of The Pack Shack, Inc. (the "Appellant") appealing the Zoning Violation Formal Notice issued by the Howard County Department of Planning and Zoning ("DPZ") dated June 15, 2006 for the operation of an adult entertainment business in violation of Sections 128.H.2.b, 128.H.3, and 128.H.6.a of the Howard County Zoning Regulations (the "Regulations").

The Appellant was represented by Howard J. Schulman, Esquire. DPZ was represented by Louis P. Ruzzi, Senior Assistant County Solicitor.

Anthony LaRose testified on behalf of DPZ. No one testified for the Appellant.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. The Appellant operates a business on a 1.349-acre property located at 8445 Baltimore National Pike in Ellicott City (the "Property"). The Property is zoned B-2 (Business: General). The Property is improved by a one-story building situated 165 feet from the nearest residentially zone property.

2. Mr. LaRose, DPZ's Zoning Enforcement Supervisor, testified that, based upon a complaint received by the Department, he and another DPZ inspector, Steve Rolles, conducted an inspection of the Property on or about May 30, 2006. In the course of their inspection, Mr. LaRose and Mr. Rolles observed some merchandise and materials that contained matter that depicted, described or related to sexual activities. The inspectors measured the spaces within the building and counted the items for sale or rent, including books, magazines, DVDs, and computer software. The inspectors excluded some items, such as lingerie and vibrators, because they were not regarded as "viewable materials" within the meaning of the Regulations. The inspectors prepared a site map (Exhibit 1) and a list of items (Exhibit 2) found on the premises. They found that 68.3% of the floor space of the premises was devoted to adult viewable material. More than 47% of the stock of merchandise was adult viewable materials.

3. At the invitation of the Appellant, Mr. LaRose and Mr. Rolles reinspected the premises on August 24, 2006 and found that 66.4% of the total floor space of the premises, and more than 47% of the stock of merchandise, contained adult viewable materials (Exhibits 2 and 3). Mr. LaRose also observed 16 viewing booths on the Property in rooms with doors which, if closed, prevented a person from seeing inside the room. The booths showed adult movies depicting sexual content. Mr. LaRose presented a list of the titles of some of the books, magazines, movies and videos found on the premises, which contain explicitly sexual references (Exhibit 4). He stated that none of the movies or videos was non-adult material and that he observed that the covers of the movies and videos depicted various sexual acts. Mr. LaRose further testified that he observed holes of two inches or more in the adjoining walls of some of the booths.

4. Mr. LaRose testified that he measured the distance from the premises to the apartment complex to the rear of the Property, which is zoned R-A-15, and found it to be about 165 feet. This measurement confirmed a previous measurement to which the parties stipulated in a pleading in Circuit Court in 1999 (Exhibit 5).

5. On September 26, 2006, Mr. LaRose took photographs of the site which depict signs advertising "adult video," "viewing booths," "lingerie," and "open 24 hours" (Exhibit 6).

6. Mr. LaRose testified that DPZ has never received from the Appellant an application for a permit for an adult entertainment business on the Property.

7. On or about June 15, 2006, Mr. LaRose issued a Zoning Violation Formal Notice to the Appellant citing violations on the Property for (1) operating an adult entertainment business less than 300 feet from residentially zoned property; (2) maintaining viewing booths with doors that allow the interiors of the booths to be screened from the view of employees and customers; and (3) operating an adult entertainment business without a permit.

CONCLUSIONS OF LAW

1. Section 130.A.3 of the Zoning Regulations authorizes appeals of DPZ decisions, including violation notices:

"Appeals to the Hearing Authority may be taken by any person aggrieved, or by any officer, department, board or bureau of the County affected by any decisions of the Department of Planning and Zoning. Such appeal shall be filed not later than 30 days from the date of the action of the Department of Planning and Zoning and shall state the reasons for the appeal."

2. Rule 10.2(b) of the Hearing Examiner Rules of Procedure provides in pertinent part that "in an appeal of an administrative agency's issuance of a violation of a County law or regulation, the agency must show by a preponderance of evidence that the respondent has violated the law or regulation in question. The respondent must prove all affirmative defenses, such as nonconforming use, by a preponderance of the evidence."

3. In this case, DPZ alleges that the Appellant has violated paragraphs 2.b, 3, and 6.a of Section 128.H of the Regulations, which state in pertinent part:

2. The building containing an adult entertainment business shall be located:

...

b. At least 300 feet from residential ... zoning districts, provided the zoning district existed prior to establishment of the adult entertainment business.

...

3. The interior of the establishment shall be arranged so that employees and customers can observe all areas open to customers. Viewing booths shall not be equipped with curtains, doors, or any other device that allows a booth's interior to be screened from the view of employees or other customers.

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6. A zoning permit is required for any adult entertainment business prior to commencing operation of the business. The business owner(s) must apply for a zoning permit from the Department of Planning and Zoning.

4. The undisputed evidence in this case clearly indicates that (a) the Appellant has not applied for a permit to conduct an adult entertainment business on the Property, (b) the building on the Property is less than 300 feet from the adjoining residentially zoned property, and (c) the viewing booths within the building are equipped with doors which render them invisible from customers and employees. These facts compel the conclusion that the Property is in violation of the

above-quoted provisions of Section 128.H, provided that the activities conducted on the site constitute an "adult entertainment business" and, more specifically, an "adult book or video store."

5. The Regulations, at Section 103.A.4, define an "adult entertainment business" to include an "adult book or video store," which is:

"A business establishment open to the public or to members that offers for sale or rental any printed, recorded, photographed, filmed or otherwise viewable material:

(1) Where at least 20 percent of the stock in trade of such material on the premises is characterized by an emphasis on matters depicting, describing or related to sexual activities; or

(2) Where at least 20 percent of the total usable floor area of the establishment is devoted to storage or display of such material that is characterized by an emphasis on matters depicting, describing or related to sexual activities."

6. In this case, DPZ has presented sufficient evidence to show that an adult book or video store was being operated on the Property. Mr. LaRose provided testimony of his and Mr. Rolles' direct observations that more than 47% of the viewable merchandise on the premises, and over 66% of the floor space, contained material that depicted, described or related to sexual activities. While the inspectors did not view or read every video, book, or magazine in the establishment, they reasonably inferred the contents of the materials from their titles and the pictures on their covers. Moreover, the photographs of the exterior signage on the building indicate that the establishment holds itself out as an adult entertainment business. The Appellant provided no evidence or testimony to the contrary.

7. The Appellant makes two arguments as to why the violation notice should be overturned. First, the Appellant contends that the provisions of the Regulations pertaining to adult

entertainment businesses are vague and overbroad and therefore unconstitutional. Second, the Appellant argues that, because the business was established before the latest revisions were made to the adult entertainment business provisions of the Regulations, the establishment should be treated as a nonconforming use.

8. With respect to the Appellant's first argument, the issue of the constitutionality of a previous version of the County's adult entertainment business regulations was addressed squarely by the Maryland Court of Appeals in *The Pack Shack, Inc. v. Howard County*, 377 Md. 55, 832 A.2d 170 (2003). In that case, the Court found that the County regulations were content neutral and furthered important and substantial governmental interests in regulating adult businesses. 377 Md. At 70, 832 A.2d at 179. The Court found, however, that certain portions of the regulations, dealing with particular licensing requirements and location and distance restrictions, posed an excessive burden on free speech.

Subsequent to the Court of Appeals' decision, the Howard County Council enacted Council Bill No. 50-2004, which eliminated all of the provisions of the adult entertainment business regulations that the Court found objectionable. It is this version of the law under which the violation notice was issued. Consequently, absent more specific and compelling arguments as to why the current law does not meet the standards established by the Court of Appeals, I find that the County's adult entertainment business regulations are constitutional.

9. Regarding the Appellant's second argument, with its enactment of Council Bill No. 50-2004, the County Council enacted Section 128.H.5, which provides:

a. Except as provided in subsection (b) below, an adult entertainment business lawfully established prior to the effective date of these requirements shall conform to all of the requirements set forth herein on or before thirty days after the effective date of these requirements.

b. An adult entertainment business lawfully established prior to the effective date of these requirements must conform to the permitted use and locational requirements set forth in Section 128.H.2 on or before one year after the effective date of these requirements.

This amortization period takes precedence over the more general provisions of the Regulations concerning nonconforming uses (Section 129). As pointed out by DPZ, such amortization provisions are a lawful and reasonable means of eliminating otherwise nonconforming uses. In this case, the subject establishment had operated for more than a year after the effective date of CB 50-2004.

10. For the foregoing reasons, I conclude that DPZ has shown by a preponderance of evidence that the Appellants have violated Section 128.H.2.b, 128.H.3, and 128.H.6.a of the Regulations.

ORDER

For the foregoing reasons, it is this 10th day of October 2007, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of appeal of The Pack Shack, Inc., in BA Case No 570-D is hereby **DENIED.**

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Thomas P. Carbo

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.